STATE OF MICHIGAN

IN THE SUPREME COURT

PAULETTE STENZEL,

Plaintiff-Appellee,

v.

BEST BUY CO., INC.,

Defendant

and

SAMSUNG ELECTRONICS AMERICA, INC.

Defendant-Appellant.

Supreme Court No. 156262

Court of Appeals Docket No. 322018

Ingham Co. Cir. Ct.
Case No. 14-000427-NO

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DEFENDANT-APPELLANT SAMSUNG ELECTRONICS AMERICA, INC.'S REPLY IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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I. SAMSUNG PRESENTED COMPELLING REASONS FOR WHY LEAVE SHOULD BE GRANTED THAT PLAINTIFF DID NOT ADDRESS.

Samsung Electronics America, Inc.'s ("SEA") application for leave to appeal to this Court ("Application") presented two issues: (1) the Court of Appeals' original panel decision holding that a genuine issue of fact existed on the issue of proximate cause, and (2) the Court of Appeals' special panel decision holding that Plaintiff's claim against SEA was not time-barred.[1]

Rather than responding to SEA's Application, Plaintiff's Brief Opposing Application ("Opp"), is little more than a cut and paste job from her supplemental brief to the Court of Appeals' special panel. As a result, Plaintiff entirely ignores the issue of proximate cause, which is one of the main bases for SEA seeking leave from this Court, and which could be a dispositive issue.

In addition, Plaintiff does not address two issues discussed extensively in SEA's Application: (1) the special panel's failure to apply the separation of powers principles set forth by this Court in *McDougall v Schanz*, 461 Mich 15, 29-30; 597 NW2d 148 (1999), and (2) the special panel's erroneous finding that the statute's relation-back provision still applied even after it found the statute's leave of court requirement was invalidated by the court rule.

SEA's Application should be granted.

A. Leave to appeal should be granted because the special panel failed to apply modern separation of powers principles.

As explained in section II.B of SEA's Application, in *McDougall* this Court discarded what it viewed as an excessively mechanical approach to analyzing the boundaries between judicial and legislative rulemaking authority. In essence, the Court found that some of its

[1] SEA's appeal of both decisions was timely under MCR 7.215(J)(7), which states that in the event the Court of Appeals convenes a special panel, the time limit to appeal the "decision in the case at bar" runs from the date of the special panel's decision.

previous decisions had relied too heavily on superficial "procedural" and "substantive" labels when considering whether rules fell within the purview of judicial or legislative rulemaking authority. Instead, this Court set forth a more functional approach, recognizing that rules with procedural elements may nevertheless be within the legislative prerogative when they are connected to substantive rights. 461 Mich at 30. This shift was solidified four years later in *Gladych v New Family Homes, Inc*, 468 Mich 594, 600-01; 664 NW2d 705 (2003) (concluding that the limitation periods provided by statute served substantive goals, and therefore statutory requirements regarding the tolling of the statute of limitations superseded a conflicting court rule, even though such tolling requirements had previously been considered "procedural" and within the exclusive domain of the judicial branch).

The special panel ignored the central premise of *McDougall* and *Gladych* by looking at the statutory leave of court requirement from MCL 600.2957(2) in a vacuum, labeling it as procedural, and then concluding that any court rule in conflict (including MCR 2.112(K)(4)) must supersede. (*See* Application, pp. 21-23). Plaintiff's response pretends that the shift in *McDougall* and *Gladych* never happened. Plaintiff relies on pre-*McDougall/Gladych* cases, going so far as to cite the holding from *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971), (Opp., pp. 7-8) that this Court expressly overruled in *Gladych.*

Plaintiff cites two post-*McDougall/Gladych* cases, *Davis v State Emples Ret Bd*, 272 Mich App 151, 725 NW2d 56 (2006) and *Hatcher v State Farm Mut Auto Ins Co*, 269 Mich App 596, 712 NW2d 744 (2005), but misinterprets them. (Opp., p. 8). She relies on the fact that *Davis* acknowledged that statutes of limitations have been "generally coined as procedural," but fails to mention that the court there noted that statutes of limitations "necessarily affect substantive rights" and therefore should not fall within a "procedural" exception to a general rule

that statutes only apply proactively. 272 Mich App at 160-61. Thus *Davis* actually undermines Plaintiff's own argument that statues of limitations should always be rigidly viewed as procedural in nature. And *Hatcher's* high-level reference to statutes of limitations being procedural in nature was not made in the context of a separation of powers analysis involving the respective rulemaking authority of the judicial and legislative branches. Rather, *Hatcher* analyzed whether a statute of limitations provision violated constitutionally-protected due process, and in a line of alternative reasoning, applied a heightened due process standard specific to procedural aspects of rules. 269 Mich App at 605-06. Plaintiff's only recognition of *Gladych* is to lift a few high-level quotes from dicta related to conflicts between statutes and court rules, while ignoring the actual holding of the case—the part overruling *Buscaino* and concluding that the statutory tolling conditions, traditionally viewed as procedural, superseded a court rule to the extent there was a conflict. (Opp., p. 8).

B. Leave to appeal should be granted because the special panel erred in finding that the statute's relation-back provision applied.

As discussed in Section II.C of SEA's Application, the special panel erred in finding that the relation-back provision in the statute still applied after it found the statute's leave of court requirement to be invalidated by the court rule. In short, the unambiguous plain language of MCL 600.2957(2) says that relation back is only permitted if a plaintiff adds the nonparty "under the subsection," and the subsection—as the Legislature actually wrote it—expressly requires both timeliness *and* leave of court to amend a complaint. This means under Michigan's longstanding statutory interpretation and severability principles, the substantive right of relation back is not available to a plaintiff unless the plaintiff meets both conditions required by the Legislature: timeliness and leave of court.

But apparently the special panel did not like this result from a policy standpoint, because it decided that what the Legislature *really* meant was that timeliness by itself is sufficient for relation back, regardless of whether the plaintiff sought leave of court. In the end, the special panel contravened the unambiguous plain language of the statute by crafting a new rule, which consisted of the panel's favorite part of the court rule (the absence of a leave of court requirement) and its favorite part of the statute (the relation-back provision).

Such an approach openly contravenes bedrock principles of statutory interpretation, as discussed above. See, e.g., *Gladych*, 468 Mich at 597 (when the language of a statute is unambiguous, courts must "presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written"). Moreover, the special panel did not apply the proper severability analysis framework to see whether the relation-back provision was still valid once it found the statute's leave of court requirement to be superseded by the court rule. See, e.g., *Midland Cogeneration Venture LP v Naftaly*, 489 Mich 83, 95-96; 803 NW2d 674 (2011) (holding that a statutory provision was unconstitutional and then stating, "we must determine whether the entire statute is unconstitutional or whether its last sentence is severable").

Plaintiff's response does not address the issue of severability, and barely acknowledges the issue of whether the relation-back provision remains valid after the special panel found the statutory leave requirement to be superseded by the court rule. Plaintiff's choice to essentially pass on these issues only validates SEA's position that they warrant review by this Court.

II. PLAINTIFF DID NOT SEEK LEAVE TO AMEND FROM THE TRIAL COURT

Plaintiff argues that even if this Court reverses the special panel, her claim should not be dismissed as time-barred because she did in fact seek leave of court to amend during a trial court

hearing, and the trial judge contravened the statute by not granting her motion. Plaintiff points to an exchange with the trial judge just after the judge granted Best Buy's motion to file a notice of fault of Samsung at which Plaintiff's counsel said, "So, Your Honor, I have 91 days from the day of the order?" The judge responded no, and asked the parties to stipulate to extending the scheduling order. (April 1, 2015 Transcript, p. 11).

Generally speaking, it would be highly imprudent to rely on such a laidback exchange as constituting a "motion of a party." And in this particular case, the trial judge—presumably the one in in the best position to assess whether the Plaintiff orally moved for leave—did not understand the Plaintiff to have ever sought leave. Rather, the judge granted summary disposition for SEA on the basis that Plaintiff did *not* comply with the statutory requirement of seeking leave to amend. (July 22, 2015 Transcript, pp. 13-15). And during SEA's summary disposition hearing, Plaintiff's counsel did not even claim that it previously moved for leave of court—it simply argued that leave of court was not required. (*Id.*).

It is telling that this issue was not raised by the Plaintiff in her brief to the original panel of the Court of Appeals. Rather, Plaintiff raised it for the first time in her supplemental brief to the special panel. The special panel apparently did not consider it a viable argument because if it did, the panel would have been required to return the issue to the original panel for "further consideration" of a "remaining, unresolved issue" outside the issue of the interaction between MCL 600.2957(2) and MCR 2.112(K)(4). (MCR 7.215(J)(5) (requiring that any unresolved issues outside the scope of the question reviewed by the special panel "shall" be returned to the original panel "for further consideration")).

In sum, Plaintiff never expressly moved the trial court for leave to amend. If that wasn't enough by itself, (1) the judge was never under the impression that Plaintiff sought leave to

amend, (2) the special panel did not feel compelled to return this issue to the original panel on that issue; and (3) Plaintiff herself didn't think to claim that she sought leave to amend until late in the appellate game. There is no basis for Plaintiff raising this issue now.

CONCLUSION AND REQUEST FOR RELIEF

For the above stated reasons, and those set forth in the Application, Defendant-Appellant respectfully requests that this Court grant its Application for Leave to Appeal, and on appeal, reverse the Court of Appeals' opinions and reinstate the Circuit Court opinion and order granting summary judgment to SEA.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Dated: September 26, 2017

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CERTIFICATE OF SERVICE

This is to certify that on **September 26, 2017** the foregoing **Defendant-Appellant Samsung Electronics America, Inc.'s Reply In Support Of Its Application For Leave To Appeal** has been electronically filed with the Clerk of the Court through the ECF system, which will send notification to all ECF participants.

/s/ Jill M. Wheaton
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